Supreme Court, U.S.
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No. 02-_____

IN THE

Supreme Court of the United States

Eric L. Michael ,

Petitioner,

v.

St, Joseph County, et. al.,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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*Appearing **Pro Se***

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52 pp

QUESTIONS PRESENTED

A local subdivision planner voluntarily stopped to have a "casual conversation" with the Petitioner, a local Health Department inspector, while the Petitioner was conducting an inspection at a subdivision the planner had worked on. The planner eventually wrote a letter to the Petitioner's supervisor expressing concern about the Petitioner's speech, which he characterized as a " negative attitude and personal antagonism toward the policies of the Local and State Health Departments with regard to septic systems and water supply". The Petitioner was suspended approximately two weeks after the planner wrote the letter and then an investigation was commenced. The Petitioner's public employer cited the speech as probable cause to uphold his suspension without pay. The following questions are presented:

1. Does the precise content of a public employee's speech have to be known in order to demonstrate that the speech is protected, or is a characterization of an employee's speech as speech which is critical of his employer's policies sufficient to establish that speech as protected speech ?

2. Did the Court of Appeals err in granting summary judgement to the Respondents on the Petitioner's First Amendment claim ?

3. Did the Petitioner speak on a matter of public concern ?

PARTIES

All of the petitioners are listed in the caption on the cover. The sole petitioner is not a corporation. See Rule 29.6.

In addition to the respondent listed in the caption on the cover, the following persons or entities were respondents in the proceedings below and are respondents in this Court:

St. Joseph County; Dr. George Plain, Individually and in his representative and official capacities as the County Health Officer; Anthony L. Patton, Individually and in his representative and official capacities as Director of Environmental Health; and Tony Mancuso, Individually and in his representative and official capacities as Environmental Supervisor.

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DECISIONS BELOW

The decision of the District Court is unpublished. App. at 1a. The decision of the United States Court of Appeals for the Seventh Circuit is published. *See Michael v. St. Joseph County, et. al.*, 259 F.3d 842 (7th Cir. 2001); App. at 13a. On November 19, 2001 Justice Stevens extended the time for Petitioner to file a petition for writ of certiorari to and including January 6, 2002 by granting the Petitioner's Application No. 01A400. App. at 22a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued it's opinion affirming the judgement of the United States District Court for the Northern District of Indiana, South Bend Division on August 3, 2001. No rehearing was applied for or held. It is believed this Court has jurisdiction under Title 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The following constitutional and statutory provisions involved in this case are set forth in the Appendix to the Petition: United States Constitution amends. I and XIV § 1; Indiana Constitution Article 1 § 9; Indiana Code § 16-19-1-2.

STATEMENT OF THE CASE

The Court of Appeals upheld the decision of the District Court that the Petitioner had not spoke on a matter of public concern, and thus denied Petitioner's claim that the Respondents retaliated against him in his employment for exercising his First Amendment right to free speech. The court did so despite: 1) evidence which characterized Petitioner's speech as criticisms of his employer's public policies and

also as speech on a matter of public health ; 2) direct evidence from the Defendants' that they knew of such speech and disciplined the Petitioner for this speech; 3) evidence in the record which if viewed in a light favorable to the Plaintiff showed motive on the Respondents part for wanting to eliminate the Petitioner due to his speech; and 4) other evidence in the record establishing that the Petitioner had been critical of the Department's policies.

A. Statement of Material Facts

Eric Michael, hereafter Petitioner, began working for the St. Joseph County Health Department (Department) on February 8, 1989 as a water resource and vector control sanitarian. [1] The Petitioner was never disciplined for any work related conduct or failure to perform during the eight and one-half years he was actively employed by the Department. [2] The Respondents admit that the Petitioner was outspoken on certain issues and that he "expressed various concerns" during his employment with the County.[3] The Respondents were aware that the Petitioner had been openly critical of the Department's policies with regard to water supply in St. Joseph County during his employment [4], and that he expressed various concerns to his supervisors, including the individual Respondents, and to his coworkers, regarding problems within the Department.[5] The Petitioner

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[1] Complaint, ¶ 14; Answer¶ 14. Filed in the United States District Court for the Northern District of Indiana (USDC N.D. IN). References herein are made to the document filed and court in which it was filed.

[2] Exhibit A, Michael Dep., P. 67, line 6; in Def Rep; USDC N.D. IN

[3] Answer, ¶¶ 15-16; USDC N.D. IN

[4] Complaint, ¶ 19 ; Answer ¶ 19; USDC, N.D. IN

regarding problems within the Department.[5] The Petitioner asserts that he "was outspoken on issues of water quality in the County both inside and outside of the Health Department" throughout his tenure and that the problems referred to above involved, but were not limited to, "the Department's inability and/or unwillingness to adequately enforce statutory and regulatory requirements applicable to septic systems and swimming pools, and the Department's inability and/or unwillingness to vigilantly protect the quality of water in St. Joseph County." [6] The Petitioner also asserts that he frequently communicated his concerns, as described above, to members of the general public and to the news media. [7]

When questioned in his deposition about the last time he spoke in a public forum the Petitioner understood "public" to mean "At a public meeting", "... where there was a table up front, where there were representatives...". [8] In accord - ance with this definition, the last time the Petitioner spoke in public was in October of 1996 when the Petitioner represent- ed the Department at a meeting, "on the ... proposed ground water ordinance" to explain the reaches of the Department's "proposed ground water ordinance ". [9] The Petitioner acknowledged that at a public meeting on Sept- ember 5, 1997 he offered a forthright criticism of the manner

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[5] Complaint,¶ 16 ; Answer ¶ 16; USDC, N.D. IN

[6] Complaint, ¶ 15- 16; USDC, N.D. IN

[7] Complaint, ¶17; USDC, N.D. IN

[8] Exhibit A, Michael Dep., p. 67 , line 17 – p. 68, line 22; Def. Rep.; USDC N.D. IN

[9] Exhibit A, Michael Dep., p. 70, lines 3 –14; Def. Rep.; USDC N.D. IN

in which the Department's septic system ***policy*** was allowing septic systems to be installed in St. Joseph County in "... too dense a matter ..." (sic). [10]

In early February 1997, the Petitioner spoke with an employee of the Indiana State Department of Health, which "is the superior health department of the state to which all other health boards are subordinate" [11], at a conference at the Elkhart County Health Department. The Petitioner characterized this conversation as an "agreed criticism" of his Department's "***policy*** of distributing rat bait "; at this same conference the Petitioner spoke with employees of other Health Departments who also expressed a negative view of the St. Joseph County Health Department.[12] (Respondent Tony Mancuso, in an August 1, 1997 letter to Dr. Plain, implied that the Department was suffering from a poor perception by the community at large. [13])

In the summer of 1997, while the Petitioner was conducting an inspection at a local residential subdivision in Harris Township, Mr. John Linn, one of the professional planners of the subdivision stopped to have a casual conversation with the Petitioner. [14] At the conclusion of this conversation Mr. Linn was slightly disturbed by the Petitioner's "negative

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[10] Exhibit A, Michael Dep., p. 69, lines 7 -10 and p. 70, lines 15 - 25; Def. Rep.; USDC N.D. IN

[11] Indiana Code (IC) 16-19-1-2

[12] Attachment 5, Michael Dep., pg. 45, line 17 - pg. 46, line 15; Plaint. Resp.; USDC, N.D. IN

[13] Attachment 1, Dep. Ex. 9, ¶ 4.; Plaint.Resp.; USDC N.D. IN

[14] Attachment 3, Dep Ex. 1 ¶ 3.1 and Attachment 2, Dep. Ex. 12 , ¶ 1; Plaint. Resp.; USDC N.D. IN .

attitude and personal antagonism toward the ***policies*** of the Local and State Health Departments with regard to septic systems and water supply in St. Joseph County." [15] On July 17, 1997 Mr. Linn sent a letter to Anthony Patton, the Director of Environmental Health for the Department, communicating his concern and suggesting that Patton, "may wish to discuss and clearly explain the policies, goals and objectives of the Health Department with Mr. Michaels (sic). [16] There is nothing in the record to even remotely suggest that this was done. Mr. Patton states in his affidavit that all his decisions relating to the Petitioners work performance were based on, " information received from ...members of the public dealing with him." But then in the same breath Mr. Patton states that none of his actions were , " ...motivated by any comments [Petitioner] made to the ...public in general."[17]

On August 1, 1997 Tony Mancuso, who was the Petit - ioner's last, direct supervisor [18] , wrote a letter to Dr. George Plain, the Department's health officer, stating that in his "opion (sic) Mr. Michaels (sic) is and has been guilty of major and minor offenses as defined in the Health Depart- ment Policy Manual. " [19] Mr. Mancuso did not identify any alleged "offenses" in his letter. He did, however, state that

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[15] Attachment 2, Dep. Ex. 12, ¶ 1; Plaint. Resp.; USDC N.D. IN

[16] Id. at ¶ 2. The contents of this letter are set out in full in *Michael v. St. Joseph County, et. al.* 259 F3d 842, 844.

[17] Attachment 2, Affidavit of Anthony Patton ¶ 7;Plaint. Resp.; USDC, N.D. IN

[18] Attachment 4, Def. Ans. To Interrogatories # 4; Plaint. Resp., USDC N.D. IN

[19] Attachment 1, Dep. Ex. 9, ¶ 6 and Affidavit of Tony Mancuso, ¶ 8 ; Plaint. Resp.; USDC N.D. IN

the Department did, "not need employees, such as Eric, showing disrespect for the whole department by talking to outside contacts and telling them he (Eric) thinks we (Anthony & Tony) don't know how to run a department. Remarks like these ... should not be tolerated...". [20] Again, there is nothing in the record to suggest that Mancuso ever informed the Petitioner that he had committed an "offense".

After receiving Mancuso's letter, Dr. Plain directed it to Anthony Patton and received a memorandum from Mr. Patton dated August 4, 1997 .[21] Mr. Patton, based on his review of Mr. Mancuso's letter, came to the conclusion that, "It is in the best interest of the department to remove Mr. Michael from his position pending an investigation by the St. Joseph County Department Attorney, and his recommendation to you for a course of action."[22] While in his letter Mr. Patton refers to "the many problems that have taken place with this [Petitioner]", he does not give reference to what those "problems" may be except to note that, "Mr. Michael's (sic) has been and continues to be a source of inflammatory remarks." [23]

On August 4, 1997, based on his consideration of Mancuso's letter and Patton's memorandum, Dr. Plain informed the Petitioner in a letter that his employment had been

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[20] Attachment 1, Dep Ex. 9, ¶ 4 and ¶ 5; Plaint. Resp.; USDC N.D. IN

[21] Attachment 3, Affidavit of George B. Plain, M.D., ¶ 6.; Plaint. Resp.; USDC N.D. IN

[22] Attachment 2 and Attachment 3, Dep. Ex. 10, ¶ 6; Plaint. Resp.; USDC N.D. IN

[23] Id., ¶¶ 1- 2.

suspended without pay, pursuant to Section 610.09 of the St. Joseph County Health Department Policy Manual and ordered the Department attorney to investigate the matter. [24] This letter, like Mancuso's letter and Patton's memo, does not state with any specificity the reason for suspending the Petitioner, but only that a "complain" (sic) had been received.

Finally, after receiving a report of the investigation from the Department attorney, Plain set forth the details of the charges against the Petitioner in a letter dated September 22, 1997. [25] The Department attorney found, among other things, "...that there was probable cause to believe that [the Petitioner]... had made remarks reflecting negatively on his superiors..." during his before described conversation with Mr. Linn in Harris Township. [26] The Respondent's acknowledge in their Answer to Plaintiff's Interrogatories that the content of the Petitioner's conversation with Mr. Linn was a reason for his suspension on August 4, 1997. [27] They state, "Plaintiff had been suspended for very specific reasons as detailed in the letter [dated September 22, 1997] to him, identified above, and produced in response to the request for production."

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[24] Attachment 3, Plain Affidavit, ¶ 7 and Dep. Ex. ¶ 6; Plaint. Resp; USDC N.D. IN

[25] Attachment 3, Plain Affidavit, ¶9 and Dep. Ex. 1.; Plaint. Resp; USDC, N.D. IN. As noted on Dep. Ex. 1, the Petitioner did not receive this letter until October 3, 1997.

[26] Attachment 3, Plain Affidavit ¶ 8 and Dep. Ex. 1, ¶ 3.1; Plaint. Resp.; USDC, N.D. IN

[27] Attachment 4, Ans to Plaint. Interrogatories, ¶ 16 (referencing ¶ 6); Plain. Resp.; USDC N.D. IN

Immediately following his suspension, the Petitioner's personal property was removed from his former work area. [28] The parties dispute whether this was done with or without the Petitioner's knowledge or consent. The Petitioner alleges that Respondents told members of the public that he was "no longer with the Health Department" during his suspension, but the Respondents also deny this claim.[29] The Petitioner maintains that he was constructively discharged from his employment, which the Respondents have denied. [30]

B. Statement on Preservation Below of Federal Questions

The federal questions presented in this Petition have been the central focus of the dispute between the parties and the principal grounds of the decisions below. Petitioner sued in the St. Joseph County (IN) Circuit Court on August 4, 1999. Therein, Petitioner asserted that the Respondents had violated several of his federal constitutional rights. Petitioner alleged that Respondents violated his constitutional right to freedom of speech, expression, association, and belief, as well as his federal constitutional right not to be retaliated against or discharged from employment for the exercise of these rights. Respondents removed the case to the United States District Court of Indiana, Northern District, South Bend Division pursuant to 28 U.S.C. § 1446, on September 1, 1999. The basis for jurisdiction in the District Court was 28 U.S.C. § 1331.

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[28] Complaint, ¶ 24 and Answer, ¶24; USDC N.D. IN

[29] Complaint, ¶ 23 and Answer, ¶ 23; USDC N.D. IN

[30] Complaint, ¶¶ 26 & 31; Answer, ¶¶ 26 & 31.

1. *The District Court's treatment of the federal questions*

The District Court granted summary judgement for the Respondents. App. at 1a. The District Court found that: "It is undisputed that the Plaintiff made statements critical of his supervisors' management of the Health Department and of the Department's policies in general." App. at 5a. The District Court found that it first had to, "determine if the Plaintiff engaged in protected activity, i.e. speak out on matters of public concern." The District Court under - stood the argument as that, "Michael claims that his sus - pension which led to later termination was due to his public speeches", rather than the numerous complaints and offenses which occurred in the time frame of February 1997 through August 1997."

But the District Court did not delve into the record that was before it to discern what the Petitioner understood the word "public " in "public forum" to mean. Thus, based on Petitioner's answer to a question in his depo- sition as to when the last time was that he Petitioner spoke in a public forum the District Court found that," the last time [Petitioner] spoke in a public forum was in October of 1996. " App. at 8a. ; and the court did not consider other evidence in the record.

The District Court also completely misunderstood an essential part of the Petitioner's basis for his claims. The District Court found that, "In July, 1997, Michael sent a letter to John Linn, one of the planners of the subdivision in question, which entailed critical comments of his department." App at 8a. This was an error on the District Court's part, which substantially impeded the Petitioner's pursuit of justice in his case. Although the District Court found that the Petitioner made, "critical comments of his department." Id. , the court broke the inference of a causal connection between these comments and the Petitioner's

suspension since there was now nothing in the record to suggest that the Petitioner's managers knew of such speech.

The District Court concluded that, "Having reviewed all of the evidence presented, this court finds no genuine issue of material fact exists on this claim." App. at 9a. Thus the District Court not only failed to review all of the evidence in the light most favorable to the Petitioner, but it misconstrued the evidence it did review so as to prejudice the Petitioner.

2. *The United States Court of Appeals' treatment of the federal question on review*

The Court of Appeals affirmed the decision of the District Court. App. at 13a. Although the Appeals Court found that, "Michael did not write a letter to Linn; rather it was Linn who wrote a letter expressing concern over critical comments made to him by Michael." App. at 17a. , it concluded , " that the district court reached the right outcome regarding Michael' First Amendment claim because Michael failed to set forth evidence that he engaged in protected speech." App at 18a.

The Court of Appeals found that, "The only evidence Michael relies on is Linn's July 17, 1997 letter, which vaguely characterizes Michael's comments, and Mancuso's letter to Plain regarding Michael's attitude." App at 18a. The Court of Appeals with this statement failed to consider other evidence in the record supporting the Petitioner's claim (such as the September 22, 1997 letter from Plain to Michael stating that one of the Charges against him was for speaking to Linn), and also misstated the Petitioner's position. The Petitioner did not rely on Mancuso's letter as a means of showing he engaged in protected conduct.

The Court of Appeals' did not consider Linn's letter as it, "Reveals only that Michael exhibited a negative attitude and personal antagonism toward the Department's septic system and water supply policies." App at 18a. As there was, " no evidence in the record *definitively* (emphasis added) establishing what [Petitioner] said to Linn." App. at 18a, the Court of Appeals found that, "We simply do not have sufficient evidence in the record to determine whether [Petitioner] spoke about a matter of public concern, or whether he spoke as a citizen or employee." App at 18a.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

A. The Decision Below Conflicts with this Court's Decisions and Federal Rule of Civil Procedure 56(c) Regarding the Granting of Summary Judgement

By failing to consider all of the evidence in the record the courts below have failed to demonstrate that the Respond - ents' met their initial burden of establishing that no genuine issue of material fact exists and have failed to view all inferences in the light most favorable to the Petitioner as the non-moving party.

1. Whether the Respondents' Satisfied Their Initial Burden

The failure of the district court and the court of appeals, on *de novo* review, to consider what the Petitioner understood a "public forum" to mean, removed from inquiry a determin-

ation whether the Petitioner engaged in protected conduct in any public forum, and thus limited that inquiry to a rigidly defined "public forum", one in which their was a "table... and representatives" up front ante at 3. But when the Petitioner was speaking to Mr. Linn he was in a residential subdivision.

The Court has previously "identified three types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Frisby v. Schultz*, 487 U.S. 474 ,479 (1988) {quoting *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 802 (1985) }. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius , at* 802. To develop a residential subdivision land must be opened up for the development of streets, among other things. This Court has previously determined that "public streets and sidewalks in residential neighborhoods," were "public for[a]". *Carey v. Brown* 447 U.S. 455, 460 (1980) This Court remarked that "[T]ime out of mind" public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum." Id at 480. and that, "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public ." Id. at 480 (quoting *Hague v. CIO* 307 U.S. 496 (1939) at 515).

By focusing on the Petitioner's speech to his supervisor and arguing that there was "no evidence in the record to support [Petitioner's] claim, [Respondents'] was not free to ignore supporting evidence that the record clearly contained." *Celotex Corp v. Catrett* 477 U.S. 317, 336 (1985) (Brennan, J., dissenting). Indeed, "...the movant must discharge the burden the Rules place upon him [.] It is the defendant's task to negate, if he can, the claimed basis for the suit." *Id.* at 328 (White, J., concurring).

For the same reasoning as above the courts did not consider whether the Responents failed to carry forth their burden with respect to negating the Petitioners' claim that he was retaliated against for protected speech he made to the public, media, *or his co-workers*. While denying in their affidavits that their actions were motivated by any comments the Petitioner made to the media or the public in general, the Respondents do not deny in their affidavits that their actions were motivated by the Petitioners speech to his co-workers, as was also alleged by the Petitoner. Thus a genuine issue of material fact exists as to whether or not the Respondents were motivated by non-disruptive speech by the Petitioner to his co-workers.

2. Whether the Respondents Satisfied Their Burden of Persuasion/ Whether Genuine Issues of Material Fact Remain

"On summary judgement the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion." *Adickes v. Kress & Co.*, 398 U.S. 144 , 159 (1970), quoting *United States v. Diebold, Inc.* 369 U.S. 654, 655 (1961). Summary judgement would be appropriate for the Respondents', " only where there is no genuine issue of material fact and the moving party is entitled to judgement as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242 (1986)." *Hunt, Governor of North Carolina, et.al. v Cromartie, et.al.* 526 U.S. 541 , 549 (1999). The Petitioner as the non-moving party is entitled to have his evidence "believed and all justifiable inferences ... drawn in [his] favor." *Anderson* , 477 U.S. at 255.

"Outright admissions of impermissible [conduct] are infrequent and plaintiffs often must rely upon other evidence. Summary judgement in favor of the party with

the burden of persuasion, however, is inappropriate when the evidence is susceptible of different interpretations of inferences by the trier of fact." *Hunt*, 526 U.S. at 553.

In the case at hand, if the court would have construed the characterization of the Petitioner's speech and the other materials before it in a light most favorable to the Petitioner, it would have seen that there is more than one means of inferring what he said. He could have been talking, as other evidence in the record suggests, about the effect of the Department's policies on the community at large, rather than a private, personal issue. The evidence that was before the court demonstrated that St. Joseph County had before it a proposal for a ground water ordinance and that the petitioner had spoke publicly on this proposed ordinance and also on the effects of septic systems. Evidence in the record shows that the Respondents were aware that the Petitioner had been openly critical of his Department's policies with regard to water supply. *Infra at* 2. With this evidence before it the court should have gave credence to the possibility of public concern speech, instead of impermissibly weighing the evidence in the favor of the Respondents.

Likewise, the court determined that the Respondents were referring to private speech by the Petitioner in their letters and memos, when there was no specific words that stated that was the case. There were, however, words from which an inference of retribution for prior speech could have been made. In resolving this inference in favor of the Respondents the court erred in stating that there were no genuine issues of material fact. For the Court has recently stated that , " motivation is itself a factual question." *Hunt* 526 U.S. at 549 . The Respondents actual motivation had previously been raised in the record by the Petitioner.

3. Whether the Court did Not Consider All of the Evidence?

This Court has previously stated that , "it is universally recognized that evidence , to be relevant in an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Fed. Rule Evid. 401 " *New Jersey v. T.L.O.* 469 U.S. 325, 345 (1985). A fact that was of consequence in this inquiry was whether the Petitioner spoke out on a matter of public concern. Given this Court's previous holding and Fed. Rule Evid. 401 the court of appeals should have given consideration, in the Petitioner's favor to the evidence that was before it. This is especially so given that this Court has previously concluded that if a "sequence of events [creates] a substantial enough possibility of a [impermissible action] ", *Adickes* 398 U.S. at 158, the non-moving party should not have summary judgement entered against them.

There is nothing in the court of appeals decision to show that the considered the contents of either the August 1, 1997 letter of Tony Mancuso , the August 4, 1997 letter from Anthony Patton or the September 22, 1997 letter from Dr. Plain. This was error on the court's part. The failure of the court to do so compromises the Petitioners right to justice. The September 22, 1997 letter is direct evidence that the Respondents knew of the Petitioner's speech to Linn, *and* disciplined him for it. The August 1, 1997 letter from Mancuso is indirect evidence of causation, showing that the Petitioner's managers were upset about his speech and attempted to discipline him for it. "The task of assessing motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the [court of appeals] to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be

available.' " *Arlington Heights v. Metropolitan Housing Development Corp.* 429 U.S. 252, 266 (1977).

B. Did the Petitioner Speak on a Matter of Public Concern ?

For speech to be protected this Court has held that the speech must be capable of being " fairly characterized as constituting speech on a matter of public concern". *Connick v. Myers* 461 U.S. 138, 146 (1983). This court has previously decided that the precise subject matter of a public employee's speech is not in itself the deciding factor in determining whether the employees speech was protected speech. *See* Gihvan v. Western Line Consolidated School District *439 U.S. 410 (1979)* and *Mt. Healthy City Board of Ed. v. Doyle* 429 U.S. 274 (1977). "Although the subject matter of Mrs. Gihvan's statements were not the issue before the Court, it is clear that her statements concerning the School District's allegedly racially discriminatory policies involved a matter of public concern."" *Connick* 461 U.S. at 146.

The Connick Court made it clear that "where [a public] employee speaks out as a citizen on a matter of general concern, not tied to a personal employment dispute [and] arranges to do privately. [That employee's right to speak on] a " - matter inherently of public concern- is not forfeited by [his] choice of a private forum." *Connick* U.S. 461at 148 ,n. 8.

Because the Petitioner chose to speak individually with a member of the general public on a matter "inherently of public concern", namely the status of water supply, he too should not have to forfeit his right to speak in a somewhat private manner, with members of the general public. The Respondents have already tried to eliminate the thought from the triers of fact that there is no other type of public forum for public employees to speak on matters of public

concern save the traditional public assembly of gathering. This Court should not agree with this argument.

C. The Employer Did Not Come To a Reasonable Conclusion

The court of appeals decision also is in conflict with this Court's opinion in *Waters v. Churchill* 511 U.S. 661 (1994). The employer did not come to a reasonable conclusion as to what the Petitioner said prior to disciplining him for his protected speech. The employer did not get a statement from, or depose Linn or the Petitioner prior to making the decision to suspend the Petitioner. The letter from Linn stated that the Petitioner had been critical of the "policies" of the Department, and therefore created a "substantial likelihood that what was actually said was protected" *id.* at 676. However, the employer did not tread with a certain amount of care" or use "the care that a reasonable manager would use before making an employment decision-discharge, *suspension*, reprimand, or whatever else..." *id* at 676. Instead of doing the foregoing the employer suspended the Petitioner for approximately two (2) months before asking him about the speech referred to in Linn's July 17, 1997 letter. In this manner the employer acted unreasonably according to this Court, which stated that "it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is available", *id.* at 676 Weak evidence was utilized when the Respondents inferred that Michael spoke on private personal matters to Linn when the letter stated that the Petitioner had communicated ideas regarding the "policies" of the Department. *Infra* at 5. Strong evidence was available in the form of an affidavit or deposition from Linn, or from directly questioning the Petitioner. The Respondents' failure to do this creates a question as to their motivation, especially due to the fact

they knew the Petitoner had communicated concerns on water supply in the past.

The fact that Mr. Linn found that the Petitioner's speech to be of an "antagonistic" character should not sway this Court that what the Petitioner said to him was not in his employer's interest. As this Court has previously remarked "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed , if it is the speaker's opinion that gives offense, that consequences is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Foundation* 438 U.S. 726, 745-746 (1978).

The Petitioner's employer and community were discussing a ground water ordinance near the time that the Petitioner spoke to Mr. Linn . Discussion, necessarily entails differences of opinions. From the deposition of the Petitioner he felt that septic systems were being installed in the County in too dense a fashion. His freedom of speech should not be compromised because a developer disagreed with his opinion, for " Freedom of discussion, if it would fulfill its historical function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama,* 310 U.S. 88, 101-102 (1940). When a public employee's freedom of expression is chilled , "self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources'. *New York Times Co. v Sullivan,* 376 U.S. 254, 266 (1964)." *First National Bank of Boston v Belloti* 435 U.S. 765, 777 n.12.(1978)

II. THE PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SHOULD RESOLVE.

The decision of the court of appeals, if allowed to stand, will interfere with the constitutional right of public employees not to be disciplined for their speech. From the record it is clear that a inference, and a strong one, can be made that the Petitioner had spoke out on a matter of public concern and had been disciplined for doing so. The Respondents have made no assertions in the record that the speech of the Petitioner interfered with the conduct of the departmental office or kept the Petitioner from satisfactorily performing his job.

If this decision is allowed to stand it will be acceptable to enter summary judgement for the moving party when they a) have not sustained their initial burden and b) when the record supports inferences in favor of the non-moving party.

This judgement will also create a means for future retaliation of those public employees who speak out on matters of public concern.

Of equal importance for this Court is to decide whether the precise content of a public employees speech has to be known in order for speech by a public employee to be protected. If a characterization of the speech is not allowed then can an employer discipline a public employee for speech which has been characterized, either as protected or not. Is not a double standard created if a characterization of speech is *not* allowed to show protected speech, but it *is* allowed to show non-protected speech , such as was the case in *Waters v. Churchill* ?

CONCLUSION

The decisions below directly conflict with this Court's precedents regarding summary judge adjudication and speech by public employees. Moreover, the decision below distorts the jurisprudence governing the rights to freedom of speech, expression, association, and belief, as well as the right not to be retaliated against for exercising those rights.

"If there be time to expose through discussion the falsehood and fallacies, to avert evil by the processes of education, the remedy to be applied is more speech, *not enforced silence*." *Whitney v. California* 274 U.S. 357, 377 (1927).

For the above reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Eric Michael
2514 Prescott Drive
Mishawaka, IN 46544
219/258-0402

Proceeding *Pro Se*

United States District Court

Northern District of Indiana

ERIC MICHAEL

Plaintiff,

JUDGEMENT IN A CIVIL CASE

v.

Case No. 3:99cv495AS

ST. JOSEPH COUNTY, DR. GEORGE PLAIN, as County Health Officer, ANTHONY L. PATTON, as Director Of Environmental Health, TONY MANCUSO, as Environmental Supervisor, all sued individually and in their representative and official capacities

Defendants

[ ] **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. He issues have been tried or heard and a decision has ben rendered.

IT IS ORDERED AND ADJUDGED that judgement is entered in favor of the defendants and against the plaintiff.

Stephen R. Ludwig,Clerk

By s/_____

Deputy Clerk

Equivalent Coupon IssueYield: N/A

This document entered pursuant to Rules 79(a) and 58Of the Federal Rules of Civil Procedure on **August 3, 2000.**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ERIC MICHAEL ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CAUSE NO. 3:99-CV-495-AS**
	)	
ST. JOSEPH COUNTY,	)	
DR. GEORGE PLAIN,	)	
ANTHONY L. PATTON,	)	
AND TONY MANCUSO,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

I. PROCEDURAL HISTORY

This cause is before the court on the motion by defendants St. Joseph County, Dr. George Plain, Anthony L. Patton, and Tony Mancuso for summary judgement, filed May 15, 2000. Plaintiff Eric Michael filed his response on June 29, 2000, and defendants replied to the response on July 11, 2000.

II. FACTS

The Plaintiff asserts that he was suspended and eventually terminated from his job in retaliation for his exercise of his right of free speech under the First Amendment and the Indiana Constitution, along with theories of conspiracy, breach of contract, violation of ordinance, and promissory estoppel. The Defendants seek summary judgement on the Plaintiff's six count Complaint because the Plaintiff voluntarily resigned from his

employment, and is therefore unable to demonstrate that his employment was suspended and eventually terminated for the above mentioned reasons.

The Plaintiff, Eric Michael, was an employee of the St. Joseph County Health *[pg.1]* Department in 1997. George B. Plain, M.D. is the County Health Officer who was appointed to oversee the operations of the Health Department. In the summer of 1997, complaints regarding Eric Michael were directed to Dr. Plain. (@ 5, Plain Aff.). Tony Mancuso was Michael's direct supervisor and was employed as Environmental Supervisor for the St. Joseph County Health Department. In February, 1997, Mancuso received a letter from Todd Griffee complaining of the failure of Eric Michael to appear at an inspection. (@4 of Mancuso's Aff. And Deposition Exhibit 13 attached thereto). In April, 1997, Michael refused to follow Mancuso's direction to grant and approve permit property at a Granger, Indiana address. (@ 5, Mancuso Aff.). On July 18, 1997, Eric Michael refused to follow Mancuso's direction to return boxes to storage. (@ 6, Mancuso Aff. ; Deposition Exhibit 16 attached to Mancuso Aff.) On July 31, 1997, Mancuso received a memorandum from Michael which was very critical of the manner in which Mancuso directed Michael to move boxes. (@7, Mancuso Aff.; Dep. Ex. 15 attached to Mancuso Aff.). It was Mancuso's opinion that Michael was mischaracterizing the situation. (@7, Mancuso's Aff.) However, Michael maintains his belief that the incident was demeaning to him and was handled unprofessionally by Mancuso. On August 1, 1997, Mancuso prepared a letter to Dr. Plain in which he expressed his concerns regarding Michael and his opinion that Michael had been guilty of major and minor offenses. (@ 8, Mancuso Aff.) In his letter he explained that Michael had failed to follow a lot of his instructions and that he had shown disrespect for the whole Department by telling people his opinion that Anthony Patton and Tony Mancuso did not know how to run a department. (Dep. Ex. 9, attached to Mancuso Aff.) Mancuso denies that any of his

actions were motivated by Michael's comments to the general public and media. (@9, Mancuso Aff.) *[pg. 2]*

Dr. Plain referred Mancuso's complaints to Anthony Patton. In response, Patton prepared a memorandum to Dr. Plain stating that he did not have any confidence in Michael's ability to conduct himself professionally with the public or his co-workers, and that it would be in the best interest of the Department to remove Michael from his position, pending an investigation by the Health Department attorney. (Dep. Ex. 10 attached to Patton Aff.) Patton received a number of complaints by members of the public concerning Michael. Patton claims his actions were not motivated by any comments made by Michael to the general public or to the media, rather all of his decisions relating to Michael were based on observations of his conduct in dealing with information from his supervisor and members of the general public. (@ 7, Patton Aff.) As a result, Dr. Plain suspended Michael during investigation of the complaints. (@8, Plain Aff.)

The facts developed during the investigation indicated that there was probable cause to believe that Michael had been insubordinate, had exceeded his authority, had made remarks reflecting negatively on his superiors, had been rude with members of the public, and had poor attendance. (@ 8, Plain Aff.) Dr. Plain set forth the details of the findings and informed Michael that a hearing was scheduled before the Board of Health on October 8, 19997, to consider his case and decide whether to take further disciplinary action. (@9, Plain Aff.) According to Dr. Plain, at no time were his actions motivated by ant comments Michael made to the general public or media. On October 7, 1997, the day before the hearing was to take place, Dr. Plain received a letter of resignation from Michael. (@10, Plain Aff.) The defendants contend that no decision had been made regarding Michael's employment prior to this letter, which was to be determined by the Board of Health at the October 8th hearing. (@ 10, Plain Aff.) *[pg.3]*

It is undisputed in this case that the Plaintiff made statements critical of his supervisors' management of the Health Department and of the Department's policies in general. Michael claims that his statements are constitutionally protected because they relate directly to matters of public concern-namely, the quality of drinking water in St. Joseph County. Michael argues that it was only after he voiced his criticism of the Health Department for its failure to adequately protect the quality of ground water to Mr. Linn, the Vice President and professional planner of the subdivision in question, that he was suspended, and not because of the above mentioned complaints. Michael claims that the Department was worried about their image in the eye of the public and were concerned that Michael was hurting their image by his criticisms. The defendants claim that Michael's job was on the line due to the above mentioned offenses which occurred roughly between the summer and fall of 1997, and moreover uphold the defense that his job was never terminated, but that Michael himself resigned. However, Michael asserts that he was suspended and later terminated from employment because he was critical of the Department's policies and the way in which it was run, which he claims is constitutionally protected under the First Amendment and the Indiana Constitution as a matter of public concern. Michael also asserts claims of breach of contract, conspiracy, violation of ordinance, and promissory estoppel against the defendants.

III. ANALYSIS

Summary judgement is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law. FED. R.CIV.P. 56(c); *Celotex Corp v. Catrett*, 477 U.S. 317 (1986); Anderson *v. Liberty Lobby, Inc.*, 477 U.S. *[pg. 4]* 242 (1986);

Bragg *v. Navistar Int'l Trans. Corp.*, 164 F. 3d 373 (7th Cir. 1988). *Celotex* addressed the initial burdens of the parties under Rule 56, and *Anderson* addressed the standards under which the record is to be analyzed within the structure of Rule 56.

The initial burden is on the moving party to demonstrate, "with or without supporting affidavits," the absence of a genuine issue of material fact and that judgement as a matter of law should be granted in the moving party's favor. *Celotex*, 477 U.S. at 324 (quoting FED.R.CIV.P. 56); *Larimer v. Dayton Hudson Corp.*, 137 F.3d 497 (7th Cir. 1998). A question of material fact is a question which will be outcome determinative of an issue in the case. The Supreme Court has instructed that the facts material in a specific case shall be determined by the substantive law controlling the given case or issue. *Anderson*, 477 U.S. at 248. Once the moving party has met the initial burden, the opposing party must "go beyond the pleadings" and "designate 'specific facts shows that (sic) there is a genuine [material] issue for trial.'" *Id.* The nonmoving party cannot rest on its pleadings, Weicherding *v. Riegel*, 160 F.3d 1139 (7th Cir. 1998); *Waldridge v. American Hoechst Corp.*, 24 F.3d 918 (7th Cir. 1994); ,nor may that party rely upon conclusory allegations in affidavits. *Smith v. Shawnee Library Sys.*, 60 F,3d 317, 320 (7th Cir. 1995).

During its summary judgement analysis, the court must construe the facts and draw all reasonable inferences in the light most favorable to the nonmoving party. *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560 (7th Cir. 1996). Furthermore, it is required to analyze summary judgement motions under the standard of proof relevant to the case or issue. *Anderson*, 477 U.S. at 252-255. Applying the above standard, this Court addresses defendants' motion.

A. Free Speech Rights Under the First Amendment and Indiana Constitution *[pg. 5]*

The First Amendment to the United States Constitution protects public employees such as the Plaintiff in this case from retaliation for speaking out on matters of public concern. *Pickering v. Board of Education*, 391 U.S. 563, (1968). The Seventh Circuit in Klunk v. County of St. Joseph, 170 F.3d 772 (7th Cir. 1999) elaborated on the appropriate test for retaliation under the First Amendment as follows:

> In prosecuting a claim of retaliation under the First Amendment's Free Speech clause, the district court must resolve four issues. The first is that the speech must be on a matter of public concern. *See, e.g., Rankin v McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). If the speech addresses a matter of public concern, the employee must show that the protected speech cause, or at least play a substantial part in, the employer's decision to terminate, or take any other adverse employment action against the plaintiff. *See Mt. Healthy City Sch. Dist. Bd. Of Educ. V. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d. 471 (1977). The district court must then consider the *Pickering* balancing test. This test involves weighing the employee's First Amendment interest against the government's interest as an employer, in efficiently providing government services through its employees. *Pickering v. Board of Educ.*, 391 U.S. 563 at 568, 88 S. Ct. 1731 (1968). Finally, the defendant can still prevail if he can show that he would have terminated the employee even in the absence of the protected speech. *Mt. Healthy*, 429 U.S. at 286. The plaintiff must carry the burden of proof for the first two elements; the government has the burden for the last two. *See id.* At 287, 97 S. Ct. 568; *Glass v. Dachel*, 2 F.3d 733, 744 (7th Cir. 1993) (government must prove balancing test).

170 F.3d at 775.

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170 F.3d at 775.

In determining whether the Defendants are entitled to summary judgement on the First Amendment claim, the court must first determine if the Plaintiff engaged in protected activity, i.e., speak out on matters of public concern. *Klunk v. County of St. Joseph,* 170 F.3d 772, 775 (7th Cir 1999). In this case, Michael argues that he was speaking out on health and water quality issues which were a matter of public concern. Michael claims that his suspension which led to later termination was due to his public speeches, even though the most recent one occurred in October 1996, rather than the numerous complaints and offenses which occurred in the time frame of February 1997 through August 1997. In July 1997, Michael sent a letter to Mr. Linn, *[pg. 6]* one of the planners of the subdivision in question, which entailed critical comments of his department. This letter is the basis of his allegation that the defendants suspended him in retaliation of his voiced criticisms of the Department. Michael admitted that the last time he spoke in a public forum was in October of 1996. When asked if he criticized the department at that forum, he answered *no* , that he simply *explained* the water ordinance. (Def. Rep. EX. A). The Defendants respond that the only speech motivating the disciplinary action against the Plaintiff was his harsh criticism of his supervisor, which is a matter of personal concern, not public.

If it is found that he did speak on matters of public concern, then the plaintiff must show that the protected speech caused or at least played a substantial part in, the employer's decision to terminate his employment. *Id.* The Defendants contend that Plaintiff's free speech claims also fail here because the allegedly protected speech was not the allegedly protected speech was not the cause of his suspension and the termination of his employment resulted from his resignation, not the exercise of protected speech. The Defendants further claim that the suspension of Michael was caused by numerous 'offenses' and a hearing was scheduled for October 8, 1997 to determine if further

disciplinary action would take place. However, on October 7, 1997, Dr. Plain received a letter of resignation from Michael. Michael claims that no action was taken against him for the 'offenses' that occurred months before, but action was taken against him when he began to speak out on the matters of public concern-namely water quality.

If protected speech is found to have cause or at least played a substantial part in the decision to terminate, then the next step is the application of the *Pickering* balancing test. This requires weighing the plaintiff's First Amendment interest against the government's interest as an employer, in efficiently providing government services through its employees. *Klunk,* 170 *[pg. 7]* F.3d at 775. Here, this court must balance Michael's interest in speaking about water quality versus the Health Department's interest in maintaining a conflict-free work environment.

Finally, the employer can still prevail if it can be shown that it would have terminated the employee even in the absence of the protected speech. *Id.* Here, the defendants argue that the adverse employment action would have been justified based on Michael's insubordination and complaints, regardless of whether he engaged in protected speech, based on reasons having nothing to do with his speech. The Plaintiff argues that the only reason he was suspended was due to his 'speaking out" on matters that involved the public. He claims the Department wanted to keep up their image and that Michael was hurting that image by what he was saying about the Department, so he was suspended, which later led to the termination of his employment. Having reviewed all of the evidence presented, this court finds no genuine issue of material fact exists on this claim. Thus, the Court finds that the Plaintiff was speaking on issues of private, not public concern, and further finds that the Defendants had a legitimate basis for suspending Plaintiff's employment. The Plaintiff's claim that he was terminated in retaliation for his exercise of his free speech rights under the First Amendment and the

Indiana Constitution does not survive summary judgement. Likewise, his claim of violation of ordinance does not survive summary judgement.

B. Promissory Estoppel Claim

Under Indiana Supreme Court's holding in *Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712 (Ind. 1997), for a Plaintiff to prevail on a promissory estoppel claim:

> [t]he employee must assert and demonstrate that the employer made a promise to the employee; that the employee relied on that promise to his detriment; and that the promise otherwise fits within the Restatement test for promissory estoppel. *[pg. 8]*

689 N.E.2d at 718, citing *First Nat. Bank v. Logan Mfg. Co.*, 577 N.E.2d 949 (Ind. 1991). The Plaintiff is claiming that he relied to his detriment on the promise contained in the St. Joseph County Human Resources Policies and Benefits Manual, which states, "Employees are not to be penalized for proper use of the grievance procedure." Michael is claiming to have relied on this promise when he submitted his grievance to Mr. Mancuso. Michael claims Mancuso 'penalized" him for making his complaint by submitting a letter to Dr. Plain in regards to Michael's letter. The Defendants argue that the plaintiff's right to be free from retaliation existed independently of any promise by his employer that he would not be subject to retaliation. Also, Michael admitted to not having thoroughly read the entire manual, upon which he attests he detrimentally relied. Hence, the element of detrimental reliance does not exist to support the doctrine of promissory estoppel, making summary judgement appropriate on this claim.

C. Breach of Contract

The Plaintiff further claims that the st. Joseph County Human Resources Benefits Manual constitutes a contract which the Defendants breached. However, this manual does not apply to the Health Department, where Michael was employed. Pursuant to IND. CODE 16-20-2-2, the Health Department can adopt its own policies. A number of Indiana Court of Appeals decisions have held that the terms of an employee handbook are irrelevant unless employment is for a definite term. *See Orr v. Westminster Vllage North, Inc.*, 689 N.E.2d 712, fn 14 (Ind. 1997). Since the Health Department adopts its own policies, and the manual that the Plaintiff asserts was breached is not a valid contract, summary judgement on this claim is granted.

D. Conspiracy

Plaintiff contends that the defendants conspired together to develop and implement a plan *[pg. 9]* of retaliation against the plaintiff to chill his First Amendment right to petition the government for a redress of grievances, in violation of 42 U.S.C. 1985. For a violation of 1985 to occur, there must be a racial or otherwise class based, invidiously discriminatory animus behind the conspirators' action. *Griffen v. Breckenridge*, 403 U.S. 88, 91 S. Ct. 1790 (1971). In this case Michael has not alleged that the defendants were motivated by a class based animus. The absence of an allegation that the adverse action was motivated by membership in a particular class is fatal to the claim of conspiracy, entitling defendant to summary judgement. *Hack v. Oxford Health Care, Inc.*, 562 F. Supp. 295 (N.D. Ind 1983). Furthermore, there is no proof of an agreement or even discussion between the defendants to form the basis for a conspiracy. Also, in *Porter v. Bainbridge*, 405 F. Supp. 83 (S.D. Ind. 1975), the district court explained that "Section 1985 does not extend to conspiracies to deny due process of law or to deny First Amendment rights of freedom of speech and assembly." *Id.* At 91. Therefore, based on the lack of

evidence and foregoing authority, the Plaintiff's claim under conspiracy does not survive summary judgement.

IV. Conclusion

Therefore, for the reasons stated above, the motion for summary judgement on all six counts by the defendants is hereby, **GRANTED.** The oral argument scheduled for August 9, 2000 is now vacated. The clerk shall enter the judgement accordingly.

IT IS SO ORDERED.

Dated : August 2, 2000

"s/ Allen Sharp "
ALLEN SHARP, JUDGE
NORTHERN DISTRICT OF INDIANA

[pg. 10]

In the

United States Court of Appeals

For the Seventh Circuit

Cite as 259 F.3d 842

No. 00-4200

ERIC MICHAEL, *Plaintiff-Appellant,*

v.

ST. JOSEPH COUNTY, et. al., *Defendants-Appellees.*

Appeal from the United States District Court
For the Northern District of Indiana, South Bend Division.
No. 3:99cv0495AS - **Allen Sharp,** *Judge.*

ARGUED JUNE 6, 2001 – DECIDIED AUGUST 3, 2001

Before FAIRCHILD, BAUER, and POSNER, *Circuit Judges*

FAIRCHILD, *Circuit Judge.* Eric Michael, a former employee of the St. Joseph County Health Department (the "Department"), brought this action alleging that the Department and various managers violated his First Amendment rights by suspending him for publicly criticizing the Department's water-quality policies. The district court granted summary judgement in favor of the defendants. We affirm. ***[259 F.3d 844]***

Michael began working for the Department as a sanitarian in 1989. Eight years later Michael's supervisors began receiving complaints from local developers and other Department employees about Michael's negative attitude. On July 17, 1997, local subdivision planner John Linn sent a letter to Anthony Patton, the Department's director of environmental health, expressing concern over Michael's attitude:

> Recently, while driving through a residential subdivision site in Harris Township, Eric Michaels, [sic] happened to be at the site, so I stopped to have a casual conversation with him. At the conclusion of the discussion, I was slightly disturbed by his negative attitude and personal antagonism toward the policies of the Local and State Health Departments with regard to septic systems and water supply in St. Joseph County.
>
> If appropriate, you may wish to discuss and clearly explain the policies, goals and objectives of the Health Department with Mr. Michaels [sic].

(R. 22 at 4.) The next day supervisor Tony Mancuso directed Michael to return boxes to storage but Michael refused. Afterward, Michael submitted a written grievance accusing Mancuso of being rude, demeaning, arrogant and unprofessional. On August 1, Mancuso wrote a letter to George Plain, the Department's health officer, complaining about recurring acts of insubordination by Michael. In the letter, Mancusp referenced Michael's conversations with the public: "We do not need employees, such as Eric, showing disrespect for the whole department by talking to outside contacts and telling them he (Eric) thinks we (Anthony and Tony) don't know how to run a department." (R. 23 at 4.) Plain immediately referred Mancuso's complaint to Patton, who then prepared a memorandum assailing Michael's lack

of professionalism. On August 4, Plain suspended Michael without pay and ordered Robert Gonderman, the Department's attorney, to investigate past complaints levied against Michael.

After conducting an investigation, Gonderman submitted a letter to Plain detailing various disciplinary offenses committed by Michael. On September 22, Plain wrote Michael and apprised him of the investigation. Plain informed Michael that *[259 F3d 844]* the Department would be conducting a hearing to determine the need for further disciplinary action. Plain's letter referred to Michael's conversation with Linn:

> While conducting an inspection at Fox Chase subdivision, Mr. Michael told Mr. Linn, one of the subdivision professional planners that he did not agree with the way that the State Health Department and the St. Joseph County Health department [sic] were handling the sanitary system of the subdivision and specifically that the St. Joseph County health [sic] Department does not do what it should with respect to handling subdivision septic systems.

(R. 22 at 7.) On October 7, 1997, Michael resigned.

On August 4, 1999, Michael brought this action in St. Joseph County Circuit Court. Michael's complaint alleged under 42 U.S.C. 1983 that St. Joseph County, Plain, Patton and Mancuso violated his First Amendment rights by suspending him in retaliation for his ongoing public criticism of the Department. Michael also alleged state law claims for breach of contract and promissory estoppel. Specifically, he claimed that his suspension violated the St. Joseph County Human Resources Policies and Benefits Manual, which allegedly forbids the Department from penalizing employees for filing a grievance against supervisors.

The defendants removed the case pursuant to 28 U.S.C. 1446. After discovery the district court granted summary judgement in favor of the defendants. The court concluded that Michael failed to establish that his speech was protected by the First Amendment and that the defendants had a legitimate basis for suspending his employment. The district court also granted summary judgement in favor of the defendants on Michael's estoppel claim, concluding that he did not detrimentally rely on the county's manual.

On appeal Michael argues that the district court erred by granting summary judgement for the defendants on his First Amendment and promissory estoppel claims. We review the grant of summary judgement *de novo. Vela v. Vill. Of Sauk Vill.*, 218 F3d 661, 664 (7th Cir. 2000). Summary judgement is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law." FED. R. CIV.P. 56 (c) ; *Celotex Corp v Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed2d 265 (1986). Because the purpose of summary judgement is to isolate and dispose of factually unsupported claims, Michael must respond to the defendants' motion with evidence setting forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56 (e); *Albiero v. City of Kankakee*, 246 F 3d. 927, 932 (7th Cir. 2001). To successfully oppose the defendants motion foe summary judgement, Michael must do more than raise a "metaphysical doubt" as to the material facts, *see Wolf v. Northwest Ind. Symphony Soc'y*, 250 F.3d 1136, 1141 (7th Cir. 2001) (citation and quotation omitted), and instead must present definite, competent evidence to rebut the motion, *see Albiero*, 246 F3d. at 932.

Michael argues that he had a protected First Amendment right to criticize the Department's water-quality policies. Michael claims that his comments to Linn regarding the Department's water policies constitute public speech that is

protected by the First Amendment. Government employees do not relinquish their First Amendment right to freedom of speech as a condition of public employment. *See Pickering v. Bd. Of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d [259 F3d 845] 811 (1968); Connick *v. Myers*, 461 U.S. 138, 142, 103 S.Ct 1684, 75 L.Ed.2d 708 (1983); Myers *v. Hasara*, 226 F.3d 821, 825-26 (7th Cir. 2000). We must analyze Michael's claim under a two-step test. First we determine whether he engaged in speech as a citizen on a matter of public concern. *See Gonzalez v. City of Chicago*, 239 F.3d 939, 940-41 (7th Cir. 2001) (citing *Connick*, 461 U.S. at 147, 103 S.Ct 1684). The First Amendment is implicated when a public employee speaks as a citizen upon a matter of public concern, but not as an employee upon matters only of personal interest. *See Myers*, 226 F.3d at 826. We evaluate whether an employee's speech addresses a matter of public concern by examining the content, form, and context of the speech. *See Snider v. Belvidere Township*, 216 F.3d 616, 620 (7th Cir. 2000). The second step under *Pickering/Connick* is a balancing test. If Michael engaged in speech that is a matter of public concern, we must then balance Michael's interest in expression against the Department's interest in promoting efficient public service. *See id.* We do not reach this balancing test, however, unless Michael establishes that he engaged in protected speech. *See id.*

Michael argues that the district court erred in granting summary judgement in favor of the defendants on his First Amendment claim because it misconstrued the facts. Specifically, he refers to the district court's statement that Michael's First Amendment claim is based on a letter that he wrote to Linn criticizing the Department. Michael, however, did not write a letter to Linn ; rather it was Linn who wrote a letter expressing concern over critical comments made to him by Michael. Though this statement by the court was incorrect, we may affirm its grant of summary judgement on any ground supported by the record. *See Lawson v. CSX Transp., Inc.*, 245 F.3d 916,929 (7th Cir. 2001).

We conclude that the district court reached the right outcome regarding Michael's First Amendment claim because Michael failed to set forth evidence that he engaged in protected speech. Indeed, there is no evidence in the record definitively establishing what he said to Linn. The only evidence Michael relies on is Linn's July 17, 1997 letter, which vaguely characterizes Michael's comments, and Mancuso's letter to Plain regarding Michael's attitude. Linn's letter, however, reveals only that Michael exhibited a negative attitude and personal antagonism toward the Department's septic system and water supply policies. The letter does not recite what was said and does not reveal the circumstances surrounding the comments. What did he say? What specific Department policies were discussed? Though we need not know the precise words he used to express himself, *see Jefferson v. Ambrose*, 90 F.3d 1291, 1296-97 (7th Cir. 1996), the record sheds no light on even the gist of his comments. In addition to a lack of evidence relating to content, we are similarly in the dark regarding the context of his speech. Was his criticism part of his job duties- relevant in determining whether he made protected comments as a "citizen," or merely unprotected comments made pursuant to his regular job responsibilities? *See Gonzalez*, 239 F.3d at 941. What are his job duties? Was Michael responding to Linn's questions or was he engaged in unsolicited soliloquy within Linn's earshot? Similarly, Mancuso's letter fails to demonstrate that Michael spoke as a citizen on a matter of public concern. Mancuso merely complained that Michael has told outside contacts that Mancuso and Patton did not know how to run the Department. The letter does not specifically refer to any matter of public interest, but instead is centered upon personnel matters and the operation of the Department (and thus outside the scope of the ***[259 F3d. 846]*** First Amendment). We simply do not have sufficient evidence in the record to determine whether Michael spoke about a matter of public concern, or whether he spoke as a citizen or as an employee. Because Michael failed to

demonstrate that he engaged in protected speech, his First Amendment claim must fail.

Michael's promissory estoppel claim also fails for the same reason- he did not present evidence that he relied on the benefits manual to create a genuine issue for trial. Indiana Law recognizes two basic forms of employment: (1) employment for a definite or ascertainable term; and (2) employment-at-will. *Orr v. Westminster Vill. N., Inc.*, 689 N.E.2d 712, 717 (Ind. 1997). At-will employment is presumptively terminable at any time, with or without cause, by either party. *Id.* An employee, however, may invoke the doctrine of promissory estoppel to rebut the presumption that employment is at-will and thus require the Employer to justify the adverse employment action. *Id.* At 718. A claim for promissory estoppel has three elements: (1) the employer made a promise to the employer; (2) the employee relied on that promise to his detriment; and (3) the promise otherwise fits within the Restatement test for promissory estoppel. *Id.*

Michael argues that the Department suspended him from his job because he filed a grievance against Mancuso, claiming this violated the St. Joseph County Human Resources Policies and Benefits Manual, which forbids the Department from retaliating against employees who file grievances. The record contains no evidence, however, to support his claim that he relied on the manual in deciding to file his grievance. Though Michael testified that he attended a meeting in which the Department reviewed the manual with employees, there is no evidence that the grievance procedure was discussed at that meeting. Michael did not present any evidence that he even read the provision in the manual relating to the grievance procedure, let alone that he relied on that provision in writing his letter complaining about Mancuso. As a result, the district court correctly entered summary judgement in favor of the defendants on Michael's promissory estoppel claim.

Accordingly, the judgement of the district court is AFFIRMED.

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[259 F.3d 847]

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGEMENT – WITH ORAL ARGUMENT

Date: August 3, 2001

BEFORE : Honorable THOMAS E. FAIRCHILD, Circuit Judge

Honorable WILLIAM J. BAUER, Circuit Judge

Honorable RICHARD A. POSNER, Circuit Judge

No. 00-4200

ERIC MICHAEL,

Plaintiff - Appellant

v.

ST. JOSEPH COUNTY, ANTHONY L. PATTON, GEORGE B. PLAIN, Doctor, et. al.,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
No. 99 C 495, Allen Sharp, Judge

The judgement of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date

(1061-110393)

SUPREME COURT OF THE UNITED STATES
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WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

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479-3011

November 19, 2001

Mr. Eric Michael
2514 Prescott Drive
Mishawaka, IN 46544

Re: Eric Michael
v. St. Joseph County, et. al.
Application No. 01A400

Dear Mr. Michael;

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on November 19, 2001, extended the time to and including January 6, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,
WILLIAM K. SUTER, Clerk
By
" s/ Ruth Jones "
Ruth Jones
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

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NOTIFICATION LIST

Mr. Eric Michael
2514 Prescott Drive
Mishawaka, In 46544

Mr. Peter J. Agostino
1001 Hickory Road
Suite 10
South Bend, IN 46615

Clerk
United States Court of Appeals for
the Seventh Circuit
219 S. Dearborn Street
Chicago, IL 60604

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to Assemble, and to petition the Government for a redress of grievances.

2. Fourteenth Amendment to the United States Constitution § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Constitution of Indiana, 1851 Article 1 § 9

No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever; but for the abuse of that right, every person shall be responsible.

4. Indiana Code § 16–19-1-2

Title 16. Health
Article 19. State Department of Health
Chapter 1. Establishment of State Department of Health

Sec. 2 The state health department is the superior health department of the state, to which all other health boards are subordinate. *As added by P.L.2-1993, SEC.2.*